

U.S. Department of Justice  
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

**INDEX**

Falls Church, Virginia 22041  
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File: [REDACTED] - Lancaster

Date:

APR 13 1999

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Paul R. Foster  
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -  
Convicted of aggravated felony

In a decision dated July 20, 1998, an Immigration Judge terminated removal proceedings. The Immigration Judge found that in light of the respondent's misdemeanor conviction for which the term of imprisonment was not more than 1 year, the Service could not sustain its burden to demonstrate that the respondent was convicted of an aggravated felony. The Service appealed. The Service's appeal will be sustained and the record will be remanded.

We note that the federal definition applies to determine whether the respondent's state conviction is an aggravated felony under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). See Matter of L-G-, Interim Decision 3254 (BIA 1995); Matter of Davis, 20 I&N Dec. 536 (BIA 1992); Matter of Barrett, 20 I&N Dec. 171 (BIA 1990). Because the statutory definition of aggravated felony incorporates still other statutory definitions, a close examination of the relevant provisions is necessary. Section 1101(a)(43) of title 8 defines "aggravated felony" as, among other things, "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least 1 year." <sup>13</sup>

Section 16 of title 18, defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing

[REDACTED]

the offense." 18 U.S.C. § 16. The respondent was convicted of a misdemeanor offense for willful infliction of corporal injury to a spouse or cohabitant in violation of section 273.5(a) of the California Penal Code.<sup>1</sup> The offense for which the respondent was convicted falls within the federal definition of a "crime of violence" as the use of physical force against a person, i.e., corporal injury resulting in a "traumatic condition" to his cohabitant, is an element of the offense. 18 U.S.C. § 16; section 101(a)(43)(F) of the Act.

Although the respondent was sentenced to 365 days imprisonment for his crime, the Immigration Judge found that the respondent's conviction was not for an aggravated felony because it was a State misdemeanor conviction and because the maximum term of imprisonment which could be imposed for the offense would not make it a felony under federal law, i.e., a sentence to more than 1 year imprisonment.<sup>2</sup> We find United States v. Graham, — F.3d —,

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<sup>1</sup> Section 273.5(a) of the California Penal Code indicates that "any person who willfully inflicts upon his or her spouse, or . . . any person with whom he or she is cohabiting . . . corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both." The respondent was specifically charged and convicted of a misdemeanor offense under section 17(b)(4) of the California Penal Code which indicates, inter alia, that

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

Here, the respondent's offense was specifically prosecuted as a misdemeanor offense, therefore, maximum term of imprisonment was only 1 year.

<sup>2</sup> Pursuant to section 3559(a) of title 18, an offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is--

- (1) life imprisonment, or if the maximum penalty is death, as a Class A felony;
- (2) twenty-five years or more, as a Class B felony;
- (3) less than twenty-five years but ten or more years, as a Class C felony;

[REDACTED]

1999 WL 116282 (3d Cir. 1999), instructive with regard to the issue of whether a sentence of 1 year imprisonment for a misdemeanor crime of violence precludes a finding that the offense is an aggravated felony.

In United States v. Graham, *supra*, the United States Court of Appeals for the Third Circuit held that an alien who had been sentenced to one year imprisonment for a misdemeanor conviction of petit larceny had been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act. The Third Circuit noted that the definition of aggravated felony for a theft offense requires "the term of imprisonment at least 1 year." United States v. Graham, *supra* (emphasis added); section 101(a)(43)(G) of the Act. Although the alien's conviction in Graham would not subject him to felony punishment under federal law, the Third Circuit determined that in light of the clear language of section 101(a)(43)(G), 1 year misdemeanor was sufficient to satisfy the requirement of "imprisonment at least 1 year" to meet the definition of aggravated felony. *Id.* The Third Circuit noted that "we can see a rational reason that Congress might include them [misdemeanor offenders sentenced to a full year] in the class of defendants worthy of extra punishment . . . we are ultimately unwilling to cabin the clear import of the law to exclude from its ambit misdemeanors for which the maximum oneyear [sic] sentence was imposed." *Id.*

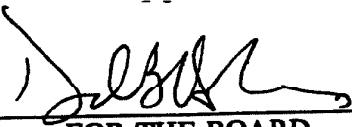
We find persuasive the reasons set forth in Graham for finding that a misdemeanor theft conviction for which the term of imprisonment is 1 year is an aggravated felony as defined in section 101(a)(43)(G). Further, we find that the facts and issue in the instant case, involving section 101(a)(43)(F) of the Act, analogous to those in Graham. This respondent's conviction was for a crime of violence and his term of imprisonment was for at least 1 year. Although the respondent's crime of violence offense was not punished as a felony under State or Federal law, we find that the respondent's conviction constitutes an aggravated felony because the respondent was sentenced to a "term of imprisonment at least 1 year" for a crime of violence, which brings it within the definition set forth in section 101(a)(43)(F) of the Act. Accordingly, the Service's appeal will be sustained and the record remanded for further proceedings.

ORDER: The Service's appeal is sustained.

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- (4) less than ten years but five or more years, as a Class D felony;
  - (5) less than five years but more than one year, as a Class E felony;
  - (6) one year or less but more than six months, as a Class A misdemeanor;

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ORDER: The record is remanded to the Immigration Judge for further  
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FOR THE BOARD

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